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Electronically filed on
January 29, 2015

9 Attorneys for Creditor Legacy Land Bank, FLCA

10 **UNITED STATES BANKRUPTCY COURT**
11 **DISTRICT OF NEVADA**

12 In re

13 MICHAEL B. NICHOLSON and
14 RASHELL D. NICHOLSON,

15 Debtors.

16 Case No. BK-S-10-33895-LED

17 Chapter 13

18 **LIMITED RESPONSE REGARDING
19 DEBTORS' MODIFIED CHAPTER 13
20 PLAN NUMBER 13, WITH
21 CERTIFICATE OF SERVICE**

22 **Confirmation Hearing**

23 **Hearing Date: 2/5/15**

24 **Hearing Time: 1:30 p.m.**

25 Debtors confirmed a plan in May 2013 (Ct. Dkt. #205). The Trustee moved to dismiss
26 less than a month later for failure to turn over a tax refund (Ct. Dkt. #207). Unsecured Creditor
27 Legacy Land Bank, FLCA filed a limited opposition to the motion to dismiss, seeking additional
28 plan payments distributed to creditors (Ct. Dkt. #223). Debtors subsequently filed their 13th
29 plan (Ct. Dkt. #226). The motion and plan repeatedly have been on calendar, with the Court's
30 most recent order conditionally approving the plan (Ct. Dkt. #243). Confirmation was subject to
several conditions and, if not satisfied, dismissal at the February 5 hearing. *Id.*

31 For the February 5 hearing, Legacy filed a renewed limited opposition to the motion to
32 dismiss, based on the conditional order contemplated dismissal, seeking distribution of plan
33 payments (Ct. Dkt. #245). Procedurally, however, the only matter on calendar on February 5 is
34 Debtors' confirmation hearing, not the Trustee's motion to dismiss. Although all relevant parties
have been served with the Legacy's points and authorities, Legacy refiles them under this new

1 title to make sure that its arguments are before the court on the confirmation hearing.

2 The below is a verbatim reproduction of the points and authority filed in Legacy's
 3 renewed limited conditional opposition to the motion to dismiss (Ct. Dkt. #245):

4 On May 30, 2014, less than a month after confirmation, the trustee moved to dismiss this
 5 case due to debtor's failure to turn over a tax refund (Ct. Dkt. #207). Unsecured Creditor Legacy
 6 Land Bank, FLCA, originally filed a limited objection (Ct. Dkt. #223). Legacy requested that if
 7 the case were to be dismissed, that the trustee distribute "any such payment in accordance with
 8 the plan as soon as is practicable" under Section 1326(a)(2) prior to dismissal, which would
 9 revest the funds with the debtors under Section 349(b)(3).

10 After six scheduled hearings, on December 19, 2014, the Court entered a conditional
 11 order regarding confirmation of debtors' 13th proposed plan (Ct. Dkt. #243). The order required
 12 debtors to do two things by January 5, 2015: (1) verify for trustee that they are current on their
 13 mortgage payments, and (2) file and notice of hearing a feasible modified plan that pays all
 14 disposable income. *Id.* Debtors did not file any modified plan by the Court's deadline, and the
 15 trustee advised she will seek dismissal on February 5, 2015, as permitted under the prior order.

16 Legacy renews its request that the trustee distribute funds on hand prior to dismissal. The
 17 trustee has advised Legacy and Debtors that she would require a stipulation to make such any
 18 such distribution. The trustee did not specify the basis for the stipulated distribution, but
 19 presumably it arises from the revestment of funds with the debtor at dismissal. *See In re Nash,*
 20 765 F.2d 1410, 1414 (9th Cir. 1985).

21 But there is no restriction on the trustee's distribution if made prior to the dismissal.
 22 There is nothing in the statute or cases that prevents entry of the dismissal order after the
 23 trustee's distribution of funds on hand. This is distinct from the facts presented in *Nash*, where
 24 the circuit held a trustee could not make a post-dismissal distribution to creditors. Legacy is
 asking that the trustee make her final pre-dismissal distribution.

25 Alternatively, the Court may order for cause that the funds in the trustee's possession do
 26 not revest with the debtor on dismissal. 11 U.S.C. 349(b)(3). Legacy asserts that cause arises in
 27 this case based on the debtors' failure to turn over its tax returns. Additionally, there were

1 repeated, continued hearings regarding dismissal premised on the claim that debtors could
 2 modify their plans to resolve the dispute—but nothing has changed in the past nine months.
 3 Creditors should not be penalized by having the funds on hand revest with the debtors, simply
 4 because the debtors did not comply with their obligations as debtors under the Code or in
 5 compliance with this Court's order.

6 Courts have found cause exists in similar situations to prevent revesting and approve
 7 distribution to creditors. “Such ‘cause’ clearly exists for this reason: The better part of a year
 8 elapsed from the time the Trustee filed his Motion to Dismiss, on October 19, 2010, until the
 9 time the Debtors' case was actually dismissed, an event which occurred on July 20, 2011.
 10 During this time, the Debtors continued to receive the benefits of the Bankruptcy Code—
 11 particularly, the automatic stay of § 362(a)—while they attempted to rectify deficiencies
 12 regarding the implementation of their plan. Having, thus, received the benefits of the
 13 Bankruptcy Code for an extended period of time, it can be expected that payments made by the
 14 Debtors while their bankruptcy case was pending should be allocated to their creditors in
 15 accordance with the intention of their Chapter 13 plan.” *In re Hufford*, 460 B.R. 172, 178
 16 (Bankr. N.D. Ohio 2011).

17 Judge Pappas reached a similar conclusion in *In re Torres*, Case No. 99-02609, 2000 WL
 18 1515170, *2 (Bankr. D. Idaho Oct. 10, 2000). There was an eight-month delay in submission of
 19 the confirmation order due to a dispute over mortgage payment obligations, and debtors
 20 ultimately moved for dismissal. While the court granted the motion to dismiss, Judge Pappas
 21 found cause for the funds to be distributed by the trustee to creditors, rather than revesting with
 22 the debtors. “While the Court attributes no manipulative intent to the Debtors here, the results of
 23 the delay are the same as those in cases where mischief is at work: Debtors received protection
 24 through the Bankruptcy Code for some ten months while their creditors received nothing. Under
 these circumstances, the interests of the creditors are at risk.” *Id.*

Dated this 29th day of January, 2015

By: /s/ Louis M. Bubala III

CERTIFICATE OF SERVICE

1. On January 29, 2015, I served the following document(s):

**LIMITED RESPONSE REGARDING DEBTORS' MODIFIED CHAPTER 13 PLAN
NUMBER 13, WITH CERTIFICATE OF SERVICE**

2. I served the above-named document(s) by the following means to the persons as listed below:

- a. **ECF System** (attach the "Notice of Electronic Filing" or list all persons and addresses):

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5 RONALD H REYNOLDS on behalf of Creditor PORTFOLIO RECOVERY ASSOCIATES,
6 LLC, SUCCESSOR IN INTEREST TO CITIBANK (SOUTH DAKOTA), N.A. (M-SHELL
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11 WOLFE THOMPSON on behalf of Creditor DISCOVER BANK / DB SERVICING
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14 MICHAEL F THOMSON on behalf of Creditor The Village Bank
thomson.michael@dorsey.com

16 I declare under penalty of perjury that the foregoing is true and correct.

17 DATED this 29th day of January, 2015.

18 Cheryl Byrne
Name

/s/ Cheryl Byrne
Signed